

ROE'S LEGACY: THE NONCONSENSUAL MEDICAL TREATMENT OF PREGNANT WOMEN AND IMPLICATIONS FOR FEMALE CITIZENSHIP

*April L. Cherry**

INTRODUCTION

In *Roe v. Wade*, the United States Supreme Court held that the state has, in the context of abortion, a compelling interest in a viable fetus.¹ This interest allows the state to proscribe most post-viability abortions, save those situations where the pregnant woman's life or health is endangered. In those instances, the pregnant woman retains the right to make all health care decisions, including the right to abortion. *Roe* was extraordinary because it expanded women's autonomy by allowing women to control one of the most life changing events—whether and when to bear children. Control of this major life function, previously depoliticized as solely a private activity, was considered a leap forward in women's ability to engage in the public sphere of work and politics. With the legalization of abortion, women were better able to defer motherhood and marriage in order to engage in education and work.² In this way, it was believed that the holding in *Roe* opened one of the doors to the legal protection of women's autonomy that had previously been nailed shut, and in doing so, *Roe* would assist in expanding women's citizenship beyond its

* Associate Professor of Law, Cleveland-Marshall College of Law, Cleveland State University. A.B., Vassar College; J.D., Yale Law School. Many thanks to colleagues Kathleen Engel, Patricia Falk, and Lolita Buckner Inniss for their helpful comments on earlier drafts, and to Tiffany Anderson and Grace Lockett for their expert research assistance.

¹ 410 U.S. 113, 162–63 (1973).

² Cf. ROSALIND POLLACK PETCHESKY, ABORTION AND WOMAN'S CHOICE: THE STATE, SEXUALITY, AND REPRODUCTIVE FREEDOM 111 (1984) (“[T]he totality of these conditions adds up to a situation in which more women are spending more years of their lives outside marriage and without direct dependence on men, focused on activities other than domesticity and child-rearing.”); Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 1017 (1984) (“[R]estricting access to abortion dramatically impairs the woman's capacity for individual self-determination.”). However, access to abortion continues to be restricted for many women as a result of their poverty and the constitutionality of state and federal denials of funds for abortion. See, e.g., *Harris v. McRae*, 448 U.S. 297, 316 (1980) (upholding the Hyde Amendment restricting federal funds for abortions for indigent women); *Maher v. Roe*, 432 U.S. 464, 474 (1977) (holding that states need to allocate funds to pay for abortions for indigent women).

historical second-class status.³ As Rosalind Petchesky notes, changes concomitant with the Court's decision in *Roe* also occurred in women's social and political status.⁴ These changes included a "new range of social conditions that redefined the terms of a 'normal life' for women."⁵ Even the Court, in *Planned Parenthood v. Casey*, took note of the importance of abortion to women's equality, stating that "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."⁶

Nevertheless, and perhaps surprisingly, *Roe's* holding has in some ways led to the derogation of women's choices, women's autonomy, and, consequently, women's citizenship.⁷ Courts have used the Supreme Court's holding in *Roe*, articulating the state's compelling interest in a viable fetus, outside of the abortion context to proscribe pregnant women's health care decision making.⁸ For example, both state and federal courts allow treatment of pregnant women when

³ See, e.g., CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 184 (1989) ("Liberals have supported the availability of the abortion choice . . . usually on the implicit view that reproductive control is essential to sexual freedom and economic independence."); PETCHESKY, *supra* note 2, at 292 (arguing that the decision in *Roe* genuinely reflected a progressive liberal climate, which viewed abortion as a fundamental right).

⁴ PETCHESKY, *supra* note 2, at 116.

⁵ *Id.*; see also Law, *supra* note 2, at 981 ("Nothing the Supreme Court has ever done has been more concretely important for women.").

⁶ *Planned Parenthood v. Casey*, 505 U.S. 833, 856 (1992).

⁷ In fact, several commentators have surmised that *Roe's* holding has led to the increased, and increasingly violent, anti-choice protest, like those supported by Operation Rescue. See, e.g., Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 385-86 & n.82 (1985) ("Heavy-handed judicial intervention was difficult to justify and appears to have provoked, not resolved, conflict.").

⁸ See, e.g., *Pemberton v. Tallahassee Mem'l Reg'l Med. Ctr., Inc.*, 66 F. Supp. 2d 1247, 1251-52 (N.D. Fla. 1999) (holding that the decision in *Roe* justified a state court's order compelling a woman to submit to a cesarean section delivery of a baby instead of normal delivery); *Jefferson v. Griffin Spalding County Hosp. Auth.*, 274 S.E.2d 457, 460 (Ga. 1981) (ruling that the state's interest in protecting a viable fetus justified compelling a woman to undergo a cesarean section delivery of her baby); *In re Jam. Hosp.*, 491 N.Y.S.2d 898, 899-900 (N.Y. Sup. Ct. 1985) (holding that the state has a significant interest in protecting the life of a midterm fetus which outweighs a patient's right to refuse a blood transfusion). In addition, I believe that *Roe's* holding has also been misused by legislatures in formulating living will and health care proxy statutes that include "pregnancy clauses" invalidating a woman's living will or health care proxy when she is pregnant. See, e.g., ALA. CODE § 22-8A-4(e) (1997); ALASKA STAT. § 18.12.04(c) (Michie 2002); OHIO REV. CODE ANN. § 2133.06 (B) (Anderson 2002); S.C. CODE ANN. § 44-77-70 (Law. Co-op. 2002). As a result of these statutory exemptions, terminally ill, comatose pregnant women are kept alive against their articulated desires because the state forces them to gestate their fetuses, regardless of their own health circumstances and health care choices. Hence, in these circumstances, the state denies women the ability to control their end-of-life health care. Although the legislative history of these statutes is slim, these statutes have a similar effect as judicial decisions compelling medical treatment. The statutes put the life of the fetus before the health care decision making power of the pregnant woman, thereby diminishing her autonomy and hence citizenship in much the same way as the judicial decrees.

such treatment is believed to be in the best interest of the fetus.⁹ The use of *Roe* in this context severely restricts the decisional and physical privacy of individual women, and works to severely limit the citizenship of women as a social group. By derogating women's privacy, and hence their autonomy, and in so doing, subordinate all women to their potential reproductive role. Simply put, these decisions mandating treatment, require women to sacrifice their autonomy, while men do not suffer a similar restraint.¹⁰ In this way, women's citizenship status is inferior relative to the citizenship status of men.

In this Essay, I demonstrate how I have come to the conclusion that the "compelling state interest" language used by the Court in *Roe* has been used to constrain and derogate women's citizenship. In Part I, I detail *Roe*'s holding and describe some of the arguments, which use *Roe* as precedent, that seek to justify limits on health care decision making by pregnant women. I argue that because *Roe* does not address situations outside of the abortion context, it leaves intact women's common law and constitutional liberty rights to direct their medical care. Therefore, the state cannot constitutionally compel medical treatment on pregnant women for the sake of their fetuses.

In Part II, I detail some of the ways in which *Roe* has been used to harm women. Specifically, I argue that judicially compelled medical treatment harms individual women because it violates the privacy and liberty interests of individual women to engage in pregnancy-related decision making and other medical decisions.

Finally, Part III elucidates the fundamental harm that lies at the heart of these restrictions—the consignment of women to second-class citizenship. In this section I argue that judicially compelled medical treatment in this context harms women as a social group by subordinating all women to their reproductive capacity and state-sanctioned mothering roles. I also argue that such treatment diminishes women's autonomy and by so doing, derogates and disrespects women's claim to full citizenship. These harms, along with the harms to individual women, have the effect of relegating women to second-class citizenship.

⁹ I have previously explored issues regarding judicially compelled medical treatment of pregnant women in other contexts, particularly focusing on the way in which such treatment violates the common law and constitutional rights of individual women. April L. Cherry, *The Free Exercise Rights of Pregnant Women Who Refuse Medical Treatment*, 69 TENN. L. REV. 563 (2002); April L. Cherry, *Maternal-Fetal Conflicts, The Social Construction of Maternal Deviance, and Some Thoughts About Love and Justice*, 8 TEX. J. WOMEN & L. 245, 249–52 (1999).

¹⁰ See Donald H. Regan, *Rewriting Roe v. Wade*, 77 MICH. L. REV. 1569, 1583 (1979) (noting that the burdens imposed upon parents are not physical burdens that entail the loss of a parent's physical autonomy); cf. *In re George*, 630 S.W.2d 614, 622 (Mo. Ct. App. 1982) (denying adoptee's access to adoption records needed in order to determine whether the birth father was an appropriate donor); *McFall v. Shimp*, 10 Pa. D. & C.3d 90 (1978) (refusing to compel the only compatible donor, a cousin, to donate bone marrow to a dying man).

I. *ROE* AND RESTRICTIONS ON PREGNANT WOMEN'S MEDICAL DECISION MAKING

*Roe v. Wade*¹¹ is perhaps the most important case decided by the United States Supreme Court furthering women's autonomy, equality, and hence citizenship, in the twentieth century. Thirty years ago the Supreme Court, in invalidating a Texas statute criminalizing abortion, made three important declarations: (1) a woman's right to abortion is protected by the right to privacy;¹² (2) the state has an "important and legitimate interest in protecting the potentiality of human life,"¹³ which allows the state to regulate and even prohibit the abortion of a viable fetus;¹⁴ and (3) the state's compelling interest in a viable fetus cannot override a woman's abortion decision where the abortion was "necessary to preserve the life or health of the mother."¹⁵

Roe's declaration, regarding the compelling nature of the state's interest in a viable fetus, has been used as a justification for states to force nonconsensual medical treatment on pregnant women. In the context of forced medical treatment, courts assert that the state's interest in the fetus, viable or not, permits the state to affirmatively require a pregnant woman to accept treatment to preserve fetal health and life. This use of *Roe's* holding is the result of a grave misunderstanding of the nature of the state's interest in the fetus outside of the context of abortion. In fact, *Roe's* holding plainly does not address the state's interest in the fetus outside of the context of abortion.

A. *Restrictions on Pregnant Women's Health Care Decision Making Based on State Interests Articulated in Roe*

Several courts have used the "compelling state interest" language of *Roe* to support the restriction of women's medical decisions outside of the abortion context. These courts mistakenly have concluded that if the state's interest in a viable fetus is significant enough to prohibit abortion, then it is also significant enough to compel unwanted medical treatment for the fetus's sake.¹⁶ Arguably, the Supreme Court's later decisions, *Webster v. Reproductive Health Services*¹⁷

¹¹ 410 U.S. 113 (1973).

¹² *Id.* at 153.

¹³ *Id.* at 162.

¹⁴ *Id.* at 163-65.

¹⁵ *Id.* at 164.

¹⁶ See discussion of cases *infra* Part I.C and accompanying notes.

¹⁷ 492 U.S. 490 (1989).

and *Planned Parenthood v. Casey*,¹⁸ elevated the state's interest in the fetus. For example, in *Webster*, the Court questioned whether viability should be the point where the state's interest in the fetus becomes compelling, stating "we do not see why the State's interest in protecting potential human life should come into existence only at the point of viability, and that there should therefore be a rigid line allowing state regulation after viability but prohibiting it before viability."¹⁹ Later, in *Casey*, the Court located the state's interest "from the outset of the pregnancy in protecting the health of the woman and life of the fetus that may become a child."²⁰ Nevertheless, the Court in *Casey* upheld *Roe*'s essential holding: a woman's right to abort a nonviable fetus is a constitutionally protected interest.²¹

By relying on the aforementioned passages from *Webster* and *Casey*, which seem to expand the state's interest in the fetus, some courts have interpreted *Roe* and its progeny to give the state an interest in a fetus, viable or not, that permits the state to act in almost any way that would prevent the destruction of the fetus or promote fetal health.²² In these situations, the state attempts to limit the decisional and physical privacy of pregnant women when it is believed that fetal death or impaired health will be an unintended consequence of a woman's medical decision making. Consequently, the state asserts an interest in the fetus outside of the context of *Roe*'s decisional orbit—abortion. The expansion of the state's interest outside of the abortion context miscomprehends and diminishes the interest of the woman in her fetus and in her own health.

Although the Court in *Roe* did not provide women with an absolute right to abortion, *Roe* and its progeny make clear that in the context of abortion, women have the constitutional right to put their own lives and health before that of their fetuses, even after viability. Indeed, in *Thornburgh v. American College of Obstetricians and Gynecologists*,²³ the Court affirmed the right of a pregnant woman to put her own medical needs before those of her fetus. In *Thornburgh*, the Court invalidated portions of a Pennsylvania abortion statute that obligated doctors, in circumstances where the life or health of the pregnant woman was already at risk, to use abortion procedures that

¹⁸ 505 U.S. 833 (1992).

¹⁹ *Webster*, 492 U.S. at 519.

²⁰ *Casey*, 505 U.S. at 846.

²¹ *Id.*

²² See *infra* Part I.C; see also RACHEL ROTH, MAKING WOMEN PAY: THE HIDDEN COSTS OF FETAL RIGHTS 93–97 (2000) (noting that in many states judicial intervention in regards to women's health care decisions is often sought and granted).

²³ *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 768–69 (1986) (holding that states may not intimidate women into continuing pregnancies under the guise of any asserted state interest in protecting maternal health or potential life).

"would provide the best opportunity for the unborn child to be aborted alive unless,' . . . that technique 'would present a significantly greater medical risk to the life or health of the pregnant woman.'"²⁴ The Supreme Court upheld a determination that this requirement and any other that endorsed or required an increase in maternal risk was unconstitutional.²⁵ Therefore, the current law is unambiguous: the state cannot prohibit a woman from obtaining an abortion, at any time, including after fetal viability, if continuing her pregnancy would be detrimental to her health or life.²⁶ Hence, it must be unlawful for the state to require any increased risk to maternal health for the sake of fetal health outside of the abortion context as well.

*B. State Intervention on Behalf of the Viable Fetus Is Not Supported
by Roe Outside of the Abortion Context*

In addition to protecting women's health care decision making, *Roe* and its progeny speak only to the interests of the state in the

²⁴ *Id.* at 768 (quoting 18 PA. CONS. STAT. §§ 1101(2), 1103(3) (1982)).

²⁵ *Id.* The circuit court also ruled that the statute at issue was unconstitutional because it "failed to require that maternal health be the physician's paramount consideration." *Id.* at 768-69. Although the Supreme Court did not directly address this portion of the appellate opinion, the Court nevertheless seemed to affirm it by stating that it is agreed with the circuit court's analysis. *Id.* at 769; see also *Colautti v. Franklin*, 439 U.S. 379, 389-90 (1979) (finding that a woman's interest in abortion must prevail when it conflicts with those of the fetus).

Furthermore, portions of *Thornburgh* were later overruled by the Court's pronouncement in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). *Casey* overruled *Thornburgh* on the issue of informed consent by permitting the state to require physicians to give a patient information designed to "persuade her to choose childbirth over abortion," on the grounds that the state has an interest in the fetus from the outset of the pregnancy, though not compelling until viability. *Id.* at 878. This permits the state to intervene in the abortion decision making so long as that intervention does not unduly burden the woman's right to make the "ultimate decision" to abort her fetus. *Id.* at 877. In so doing, the *Casey* Court seriously limited women's decision-making autonomy, but not women's decision-making authority. Even though the state can now behave in ways that are designed to convince women to pursue non-abortion alternatives, the state undoubtedly cannot prohibit a woman pregnant with a nonviable fetus from obtaining an abortion.

²⁶ See *id.* at 846 (discussing how the state can only restrict abortions after fetal viability if the law contains exceptions for pregnancies which endanger the woman's life); *id.* at 879 ("[S]ubsequent to viability, the State . . . may, if it chooses, regulate, and even proscribe, abortion except where it is necessary . . . for the preservation of the life or health of the mother." (quoting *Roe*, 410 U.S. at 164-65)). In *Casey*, the Court located the state's interest in the fetus "from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child." *Id.* Earlier, in *Webster v. Reproductive Health Services*, the Court questioned the legitimacy of defining viability as the point where the state's interest in the fetus becomes compelling: "[W]e do not see why the State's interest in protecting potential human life should come into existence only at the point of viability, and that there should therefore be a rigid line allowing state regulation after viability but prohibiting it before viability." 492 U.S. 490, 519 (1989).

context of abortion, the intentional destruction of the fetus.²⁷ These cases simply do not address the state's interest in the fetus or in women's health care outside of the abortion context, a unique situation.²⁸ In this sense, *Roe* implicitly leaves intact women's rights to dictate their health care within the bounds of the common law and constitutional liberty rights to make health care decisions. And although the right to medical decision making is based, in part, on the common law right to bodily integrity²⁹ and can be outweighed by four countervailing state interests:³⁰ the preservation of life,³¹ the

²⁷ See, e.g., Cherry, *The Free Exercise Rights of Pregnant Women*, *supra* note 9, at 596 (discussing state interests in the abortion context as defined by *Roe*, *Casey*, and *Thornburgh*).

²⁸ Cf. Nancy K. Rhoden, *The Judge in the Delivery Room: The Emergence of Court-Ordered Cesareans*, 74 CAL. L. REV. 1951, 1953 (1986) ("*Roe* merely allows states to prohibit intentional fetal destruction after viability, unless abortion is needed to protect the woman's life or health. It says nothing about whether the state may require invasive medical procedures to *promote* fetal health." (footnote omitted)).

²⁹ See Anita L. Allen-Castellitto, *Origins and Growth of U.S. Privacy Law*, in 701 PRACTISING LAW INSTITUTE: PATENTS, COPYRIGHTS, TRADEMARKS, AND LITERARY PROPERTY COURSE HANDBOOK SERIES 83, 88–90 (June 2002) (discussing conceptual and normative underpinnings of privacy interests protected through state common law).

³⁰ See, e.g., *In re Fetus Brown*, 689 N.E.2d 397, 402 (Ill. App. Ct. 1997) (explaining that the courts generally consider four specific state interests "when deciding whether to override competent treatment decisions"); *In re President & Dirs. of Georgetown Coll.*, 331 F.2d 1000, 1006–07 (D.C. Cir. 1964), *cert. denied*, 377 U.S. 978 (1964) (ordering treatment to override a patient's incompetent treatment decision).

³¹ Regarding the state's interest in the preservation of life, the court in *In re Fetus Brown* asserted that this refers to the state's interest in the life of the decision maker. Hence, in the case of a pregnant woman, the state's interest in the preservation of life is in the preservation of the mother's life, not the life of the fetus. In addition, the state's interest in the preservation of life must be balanced with the state's interest in protecting the patient's autonomy. *In re Fetus Brown*, 689 N.E.2d at 404 (finding greater weight in the "interest in protecting the autonomy of the individual," than the state's interest in preserving the pregnant woman's life).

In addition, both the American Medical Association and the American College of Obstetricians and Gynecologists have taken the position that physicians should not, except under extraordinary circumstances, seek judicial intervention to compel a pregnant woman to submit to nonconsensual treatment. See Board of Trustees Report, American Medical Association, *Legal Interventions During Pregnancy: Court-Ordered Medical Treatments and Legal Penalties for Potentially Harmful Behavior by Pregnant Women*, 264 JAMA 2663, 2666, 2670 (1990) [hereinafter AMA, *Legal Interventions During Pregnancy*] (stating that judicial intervention is appropriate only in "exceptional circumstances," which are unlikely to occur); American College of Obstetrics and Gynecology, *Patient Choice and the Maternal-Fetal Relationship*, in ETHICS IN OBSTETRICS AND GYNECOLOGY 214 (1999), available at http://www.acog.org/from_home/publications/ethics/ethics61.cfm. [hereinafter ACOG, *Patient Choice*] (arguing that physicians should refrain from nonconsensual treatment; use of court orders to resolve conflicts between physicians and patients are almost never appropriate). Arguably then, judicially compelled treatment of pregnant women actually violates the integrity of the medical profession. Joelyn Knopf Levy makes a similar point in *Jehovah's Witnesses, Pregnancy, and Blood Transfusions: A Paradigm for the Autonomy Rights of All Pregnant Women*, 27 J.L. MED. & ETHICS 171, 182 (1999), noting that a physician is under no legal duty to seek a court order and that professional organizations do not recommend using such orders.

prevention of suicide,³² the ethical integrity of the medical profession,³³ and the protection of innocent third parties,³⁴ none of these factors are implicated in cases regarding the compelled medical treatment of pregnant women.³⁵

Moreover, the right to medical decision making is part and parcel of the right to privacy and self-determination found within the penumbra of the Fourteenth Amendment.³⁶ The Supreme Court, in *Cruzan v. Director, Missouri Department of Health*, noted that the values of the Fourteenth Amendment the protection of bodily integrity and its component, medical decision making.³⁷ The Court asserted that

³² Some commentators have noted that "[n]o reported case has held that a competent patient must undergo medical treatment he has refused in order to vindicate the state's interest in the prevention of suicide." Lawrence J. Nelson et al., *Forced Medical Treatment of Pregnant Women: "Compelling Each To Live as Seems Good to the Rest,"* 37 HASTINGS L.J. 703, 760 n.276 (1986).

³³ Courts have generally held that the integrity of the medical profession is not disrupted by or dispositive of the protection of patients' autonomy embodied in the right to refuse treatment. See *In re Fetus Brown*, 689 N.E.2d at 403 (allowing a pregnant mother to refuse life-saving treatment in a hospital). But see *Crouse Irving Mem'l Hosp. v. Paddock*, 485 N.Y.S.2d 443, 446 (N.Y. Sup. Ct. 1985) (finding that a pregnant Jehovah's Witness who agreed to a cesarean section operation but refused a blood transfusion on religious grounds could not prevent attending physicians from administering blood transfusions to stabilize her condition because the ethical integrity of the medical profession and the physician required stabilization of a patient following surgery).

³⁴ Many of the most well-reasoned cases on this state interest involve compulsory vaccination statutes, which override the freedom to refuse medical treatment because of the state's interest in public health. See, e.g., *Jacobson v. Massachusetts*, 197 U.S. 11, 38 (1905) (finding that the vaccination statute was permissible to protect the community from disease). Hence this interest should be understood as the state's interest in the prevention of epidemics and other major public health concerns. The state's interest in the compelled medical treatment of competent pregnant women is not sufficiently public and therefore the state's interest in this context is not heightened. In addition, until recently courts routinely overrode the autonomy of female patients in order to protect their minor children from abandonment. See, e.g., *In re President & Dirs. of Georgetown Coll.*, 331 F.2d at 1006-07 (compelling life-saving treatment for the mother of a seven-month-old child); *In re Winthrop Univ. Hosp.*, 490 N.Y.S. 2d 996, 997 (N.Y. Sup. Ct. 1985) (compelling transfusions during surgery against religious objections of a mother of young children "to save the life of the mother of infants"). More recently, courts have refused to subordinate patient autonomy to the state's interest in protecting minor children. See, e.g., *In re Matter of Dubreuil*, 629 So. 2d 819 (Fla. 1993) (refusing to compel treatment where there was no proof that a patient's children would be orphaned if she died); *Fosmire v. Nicoleau*, 551 N.E.2d 77, 84 (N.Y. 1990) (refusing to compel life-saving treatment "because there is a risk that their children will be left orphans" where a competent adult makes a health care decision).

³⁵ *Pub. Health Trust v. Wons*, 541 So. 2d 96, 97 (Fla. 1989) ("[T]hese factors are by no means a bright-line test, capable of resolving every dispute regarding the refusal of medical treatment.").

³⁶ *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 269-271 (1990); see also *In re Quinlan*, 355 A.2d 647, 663 (N.J. 1976), cert. denied sub nom. *Garger v. New Jersey*, 429 U.S. 922 (1976) (granting a patient in a vegetative state the right to die as an exercise of the "unwritten constitutional right of privacy . . . in the penumbra of specific guarantees of the Bill of Rights").

³⁷ Several commentators have asserted that the individual's right to refuse medical treatment is also supported by the Fourth Amendment right granting freedom from unreasonable search and seizures, because the Fourth Amendment has been interpreted as implicitly embodying a right to privacy. See, e.g., Rebekah R. Arch, *The Maternal-Fetal Rights Dilemma: Hon-*

"[t]he principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from [the Court's] prior decisions,"³⁸ and that the "Due Process Clause protects an interest in life as well as an interest in refusing life-sustaining medical treatment."³⁹

Therefore it seems clear, that even in situations involving fetal viability, pregnant women retain a constitutionally protected interest in their own lives.⁴⁰ By protecting women's decisional and physical autonomy in health care decision making outside of the context of abortion, like in *Cruzan*, the Court's opinions seem to support women's right to autonomy over the state's interest in the life and health of the fetus, except in the narrow case of the abortion of a viable fetus when the pregnant woman's life and health are not compromised by continuing the pregnancy.⁴¹ As a consequence, the state should have no power to constrain pregnant women's medical decision-making powers, even when fetal health or life is compromised as an unintended consequence of women's non-abortion health care decisions, *Roe* and its progeny leave intact women's rights to make their own health care decisions.

oring a Woman's Choice of Medical Care During Pregnancy, 12 J. CONTEMP. HEALTH L. & POL'Y 637, 644-45 (1996) (noting that the Fourth Amendment's implicit grant of privacy has been held to include a "fundamental right to bodily integrity" and the "right to reproductive autonomy"); Janet Gallagher, *Prenatal Invasions and Interventions: What's Wrong with Fetal Rights*, 10 HARV. WOMEN'S L. J. 9, 21 (1987) (stating that a determination of reasonableness of a search requires balancing the individual privacy interest against the state's need for evidence).

³⁸ *Cruzan*, 497 U.S. at 278; cf. *Washington v. Glucksburg*, 521 U.S. 702, 721-22 (1997) (recognizing the right to bodily integrity as a liberty interest protected by the Bill of Rights); *Washington v. Harper*, 494 U.S. 210, 221-22 (1990) (finding that prisoners have a liberty interest to be free from the arbitrary administration of medication without consent and nonconsensual treatment may be administered only if prisoner is danger to himself or others).

³⁹ *Cruzan*, 497 U.S. at 281; see also *id.* at 287 (O'Connor, J., concurring) (arguing further that this Constitutional protection is related to "our notions of liberty . . . our idea of physical freedom and self-determination" and the idea that "state incursions into the body [are] repugnant").

⁴⁰ *Id.* at 281 (acknowledging that the "choice between life and death is a deeply personal decision"). In her concurrence, Justice O'Connor argues that the Constitution supports the liberty interest in refusing medical treatment "[b]ecause our notions of liberty are inextricably entwined with our idea of physical freedom and self-determination, the Court has often deemed state incursions into the body repugnant to the interests protected by the Due Process Clause." *Id.* at 287 (O'Connor, J., concurring).

⁴¹ See *Planned Parenthood v. Casey*, 505 U.S. 833, 879 (1992) (reaffirming that the state may only restrict abortion of a viable fetus). In *Cruzan*, Justice O'Connor argues that the Constitution supports the liberty interest of refusing medical treatment "[b]ecause our notions of liberty are inextricably entwined with our idea of physical freedom and self-determination, the Court has often deemed state incursions into the body repugnant to the interests protected by the Due Process Clause." *Cruzan*, 497 U.S. at 287 (O'Connor, J., concurring). When read together, these opinions support the proposition that the state cannot deny women autonomy in health care decision making with regards to pregnancy, except in the narrow case of the abortion of a viable fetus, and then only if the pregnant woman's life and health are not endangered by continuing the pregnancy.

Despite its attractiveness to some courts, the argument that the state has a compelling interest in a viable fetus outside of the context of abortion miscomprehends the state's responsibilities toward the fetus and the pregnant woman. While the state's interest in the viable fetus may be compelling in the abortion context, it is not absolute. In fact, the state's interest is not so broad as to reduce a woman's interest in her own health to the health of her fetus.⁴² Nor is the state's interest strong enough to reduce women's decision making outside of the context of abortion. The state's compelling interest in the viable fetus allows it to prevent abortion under limited circumstances, but nowhere does *Roe* or its progeny suggest that the state's interest in the fetus empowers the state to "choose between treatment options for the pregnant woman when abortion is not an issue,"⁴³ and by so doing, disregard the woman's decisional authority and hence, her autonomy.

In sum, *Roe* and its progeny use the rubrics of privacy and liberty rights to leave intact a pregnant woman's right to make health care decisions without state interference outside of the context of abortion simply because these decisions are limited to abortion choices. This is certainly the case in the context of a nonviable fetus, but I believe that this is also true in the context of fetal viability. The Court simply has not addressed the issue of whether the state's interest in the fetus is compelling when harm to the fetus is an unintended consequence of a woman's medical decision making, which is normally protected by constitutional principles of physical and decisional privacy. Nor has the Supreme Court implied that its abortion decisions are precedents in other medical contexts. Thus, abortion decisions must be viewed with caution when imported to other medical contexts.

C. State Compelled Medical Treatment of Pregnant Women

The majority of reported cases of judicially compelled treatment of pregnant women, decided after *Roe*, have relied on *Roe*'s articulation of the state's interest in the fetus. The unwanted medical treatment is forced on competent pregnant women for the sake of their fetuses, at times without regard to fetal viability. These cases present serious encroachments on the autonomy, and hence, the citizenship

⁴² See Arch, *supra* note 37, at 650 (stating that the compelling interest in the life of fetus is limited by woman's right to privacy); Gallagher, *supra* note 37, at 28-29 (same); Nelson, et al., *supra* note 32, at 742 (same).

⁴³ Arch, *supra* note 37, at 650; see also Nelson et al., *supra* note 32, at 745 (arguing that incident to woman's right to privacy, women's health care interests and choices are superior to state's interest in the potential life of fetus).

of women.⁴⁴ One such example is *Jefferson v. Griffin Spalding County Hospital Authority*.⁴⁵ In this case, the Supreme Court of Georgia summarily cited to *Roe* in explaining its right to order a pregnant woman, Mrs. Jefferson, to submit to a nonconsensual cesarean section to deliver her viable fetus.⁴⁶ The trial court had ordered the surgery based on its finding that "as a matter of law . . . this child is a viable human being and entitled to the protection of the Juvenile Court Code of Georgia."⁴⁷ Furthermore, the trial court had found that any "intrusion . . . into the life" of Mrs. Jefferson or her husband was "outweighed by the duty of the State to protect a living, unborn human being from meeting his or her death before being given the opportunity to live."⁴⁸ Reviewing the trial court decision, the Georgia Supreme Court merely cited the United States Supreme Court decision in *Roe* and a pre-*Roe* New Jersey Supreme Court decision, *Raleigh Fitkin-Paul Morgan Memorial Hospital v. Anderson*,⁴⁹ to support the denial of Mrs. Jefferson's motion for a stay.⁵⁰

State courts in New York have also cited the state's compelling interest in a viable fetus articulated in *Roe* as the rationale for coercing unwanted medical procedures on competent pregnant women. For example, a New York trial court in *In re Jamaica Hospital* ordered the transfusion of a woman whose pregnancy was only in its eighteenth week.⁵¹ This decision is remarkable because the fetus at eighteen

⁴⁴ But see *In re A.C.*, 573 A.2d 1235, 1237 (D.C. Cir. 1990) (en banc) (ruling that when a woman, pregnant with a viable fetus, is near death, the question of what is to be done should be decided by the woman); *In re Baby Boy Doe*, 632 N.E.2d 326, 326 (Ill. App. Ct. 1994) (holding that a competent woman's choice to refuse advice to obtain a cesarean section during pregnancy must be honored even when her choice may be harmful to the fetus). There are a few reported cases of court-ordered medical treatment of pregnant women prior to *Roe*. For example, in 1964, the New Jersey Supreme Court issued the first reported decision of a court compelling an unwanted, nonconsensual medical procedure on a pregnant woman for the sake of her fetus. In that case, the New Jersey Supreme Court compelled an unwanted blood transfusion on a pregnant Jehovah's Witness against her religious based opposition for the sake of her viable fetus. *Raleigh Fitkin-Paul Morgan Mem'l Hosp. v. Anderson*, 201 A.2d 537 (N.J. 1964) (per curiam). Even though the trial court would not order the procedure against the woman's wishes, the New Jersey Supreme Court did, stating simply that it was "satisfied that the unborn child is entitled to the law's protection." *Id.* at 538. See also *In re President & Dirs. of Georgetown Coll.*, 331 F.2d 1000 (D.C. Cir. 1964) (authorizing a blood transfusion on a nonpregnant woman who refused the transfusion based on her religious beliefs as a Jehovah's Witness), *cert. denied*, 377 U.S. 978 (1964).

⁴⁵ 274 S.E.2d 457 (Ga. 1981) (per curiam).

⁴⁶ *Id.* at 458.

⁴⁷ *Id.* at 459.

⁴⁸ *Id.* at 460.

⁴⁹ 201 A.2d 537 (N.J. 1964) (per curiam) (compelling an unwanted blood transfusion on a pregnant Jehovah's Witness against her opposition).

⁵⁰ *Jefferson*, 274 S.E.2d at 460. Nevertheless, as previously noted, Mrs. Jefferson gave birth to a healthy child in a vaginal delivery without the assistance of medical personnel. Rhoden, *supra* note 28, at 1959-60.

⁵¹ *In re Jam. Hosp.*, 491 N.Y.S.2d 898, 899-900 (Sup. Ct. 1985).

weeks obviously was not yet viable.⁵² Nevertheless, the court compelled the transfusion, which went far beyond the holding of *Roe* in its rationale, but nonetheless the court relied on *Roe* for support. The court completely disregarded the issue of whether it had a constitutionally justified interest in a nonviable fetus by stating:

While I recognize that the fetus in this case is not yet viable, and that the state's interest in protecting its life would be less than "compelling" in the context of the abortion cases, this is not such a case. In this case, the state has a highly significant interest in protecting the life of a mid-term fetus, which outweighs the patient's right to refuse a blood transfusion on religious grounds.⁵³

In addition, the District of Columbia's Superior Court has compelled at least one cesarean section surgery despite the pregnant woman's refusal to consent. In *In re Madyun*, the court relied on *Roe*, *Raleigh Fitkin*, and *Jamaica Hospital* to hold that the compelling interest of the state in a fetus justifies overriding the refusal of a pregnant woman to consent to treatment, even when that refusal is based partly on a religious objection.⁵⁴ Finally, and indeed quite recently, in *Pemberton v. Tallahassee Memorial Regional Medical Center, Inc.*, a federal district court upheld a state court order compelling a cesarean section for the sake of the fetus.⁵⁵ After losing her bid to be allowed to refuse the cesarean section in state court,⁵⁶ Mrs. Pemberton sued the hospital in federal court alleging that several of her constitutional rights were violated, including her First Amendment right to free exercise and her rights to privacy and bodily integrity.⁵⁷ Like the state courts in the aforementioned cases, the *Pemberton* court gave little weight to Mrs. Pemberton's claims. Instead, the court focused on the "right" of the fetus to life and the compelling state interest in the vi-

⁵² *Id.* at 900. Although the woman's refusal was based on her religious beliefs, the court nevertheless ordered the blood transfusion, noting that although the woman had "an important and protected interest in the exercise of her religious beliefs," these interests could be disregarded because of her pregnancy. *Id.* at 899.

⁵³ *In re Jam. Hospital*, 491 N.Y.S.2d at 900. *But see* Taft v. Taft, 446 N.E.2d 395 (1983) (refusing to compel nonconsensual treatment of competent pregnant woman where fetus was not yet viable).

⁵⁴ *In re Madyun*, 114 Daily Wash. Law Rptr. 2233, 2240 (D.C. Super. Ct. 1986). This case has been called into serious question by the District of Columbia Court of Appeals's en banc opinion in *In re A.C.*, where the court held that "it was error for the trial court to weigh the state's interest in preserving the potential life of a viable fetus against" the pregnant woman's right to refuse medical treatment. 573 A.2d 1235, 1238 (D.C. 1990) (en banc).

⁵⁵ 66 F. Supp. 2d 1247 (N.D. Fla. 1999). The physicians at the Medical Center predicted that the odds of Mrs. Pemberton having a successful vaginal birth were slight given that she had previously had a cesarean section in which a vertical incision was used. The previous incision dramatically increased the risk of uterine rupture and the death of Mrs. Pemberton and her fetus. *Id.* at 1249.

⁵⁶ *Id.* at 1250.

⁵⁷ *Id.* at 1251.

able fetus, rather than the pregnant woman's right to make decisions regarding her health care. The court stated:

Recognizing these constitutional interests, however, is only the beginning, not the end, of the analysis. Ms. Pemberton was at full term and actively in labor. It was clear that one way or the other, a baby would be born (or stillborn) very soon, certainly within hours. Whatever the scope of Ms. Pemberton's personal constitutional rights in this situation, they clearly did not outweigh the interests of the State of Florida in preserving the life of the unborn child.⁵⁸

As in cases that preceded it in other jurisdictions, the court in *Pemberton* asserted that its decision limiting women's constitutional rights was supported by the United States Supreme Court decision in *Roe*. The pregnant women's interests were simply subordinate to the state's interests in fetal life:

The balance tips far more strongly in favor of the state in the case at bar, because here the full-term baby's birth was imminent, and more importantly, here the mother sought only to avoid a particular procedure for giving birth, not to avoid giving birth altogether. Bearing an unwanted child is surely a greater intrusion on the mother's constitutional interests than undergoing a caesarean section to deliver a child that the mother affirmatively desires to deliver. Thus the state's interest here was greater, and the mother's interest less, than during the third trimester situation addressed in *Roe*. Here, as there, the state's interest outweighed the mother's.⁵⁹

The court also noted the argument that the state's intervention in a woman's pregnancy is more intrusive than the state's prohibition of a third trimester abortion, but disregarded it stating:

One could argue that affirmative intervention is more intrusive on the mother's constitutional interests than the mere prohibition discussed in *Roe*. But any such distinction between affirmative conduct and mere prohibitions is superficial. . . . [A] third-trimester mother can be forced against her will to bear a child she does not want; this is in fact a substantially greater imposition on the mother's constitutional interests than requiring a mother to give birth by one method rather than another. And this is so notwithstanding that caesarean section is major surgery that is extraordinarily intrusive on the mother's constitutional interests.⁶⁰

The *Pemberton* court, like the courts in the majority of reported cases, reasoned that because the state has a compelling interest in a viable fetus, which permits it to prohibit the abortion of a viable fetus, the state must have a similar interest in the fetus in other contexts. These courts assume that the privacy and liberty interests of women are diminished by pregnancy, and that women's interests in privacy

⁵⁸ *Id.*

⁵⁹ *Id.* at 1251-52 (footnotes omitted).

⁶⁰ *Id.* at 1252 & n.9.

and bodily integrity must always give way to the state's interest in the fetus. These assumptions are not supported by Supreme Court jurisprudence. Indeed two state appellate courts have held that these judicially enforced bodily intrusions are impermissible as they violate a pregnant woman's rights to privacy and bodily integrity. In one such case, *In re A.C.*, the District of Columbia Court of Appeals sitting en banc, held that a trial court order compelling a nonconsensual cesarean section on a comatose pregnant woman intended to save the life of an arguably viable fetus was unlawful, as it violated both her right to privacy and bodily integrity.⁶¹ Regarding the right to privacy, the en banc court stated that "weigh[ing] the state's interest in preserving the potential life of a viable fetus against [the pregnant woman's] interest in having her decision respected" was impermissible.⁶²

The foregoing analysis exposes that the rationales used for overriding the right of competent women to refuse medical treatment are misplaced due to courts' mistaken reliance on the Supreme Court's opinion in *Roe*. The compelled medical treatment examples show that these courts' reasoning that almost any interest that the state may have in the fetus is sufficient to outweigh the woman's rights to decisional and physical autonomy is not consonant with *Roe*.

Although *Roe* and its progeny may narrow the pregnant woman's right to direct her medical treatment, as I have previously argued, they do so in a very limited fashion. The state may only prohibit the abortion or the intentional destruction of a viable fetus if the woman's life or health is not at risk. Consequently, considering the opinions in *Roe* and its progeny, pregnant women retain the right to direct their medical care, including the right to refuse medical treatment that might protect or enhance fetal life or health. The courts in these aforementioned examples violate the common law and constitutional rights of individual women to refuse medical treatment. The *Jamaica Hospital* and *Pemberton* courts seemed to recognize the limitations on their actions vis-à-vis *Roe*, but proceeded nonetheless, showing substantial disregard for the fundamental constitutional rights of the women affected.

II. HARMS TO INDIVIDUAL WOMEN

The en banc opinion in *In re A.C.* highlights that the harms done to women by court-ordered treatment are extensive. Not only are women's privacy and bodily integrity rights harmed by nonconsensual treatment on behalf of the fetus, but women's dignitary interests are

⁶¹ *In re A.C.*, 573 A.2d 1235, 1247 (D.C. Cir. 1990) (en banc).

⁶² *Id.* at 1238.

harmed by the objectification that occurs as a result of nonconsensual treatment.⁶³

Nonconsensual treatment violates the individual woman's right to privacy, her liberty interest in medical decision making and bodily integrity. These harms stem from a series of misguided beliefs with regard to pregnancy and pregnant women: (1) that the state's interest in the fetus, viable or not, is stronger than the state's interest in the health and life of the woman; (2) that the woman's interest in her own bodily integrity and medical decision making is irrelevant given that she risks death with her decision to withhold or withdraw medical treatment;⁶⁴ and lastly, (3) that the woman's interest in privacy and bodily integrity is inconsequential or nonexistent.⁶⁵

A pregnant woman's right to privacy is most clearly violated by a judicial order that disregards her competent decision to refuse or withdraw medical treatment when the fetus she carries is not viable.⁶⁶ Even if the state has a compelling interest in a viable fetus outside of the context of abortion, the state's interest in a nonviable fetus does not permit the state to prohibit its abortion. Such state interference would clearly be understood as unduly burdensome of women's privacy rights as articulated in *Casey*. As Justice O'Connor wrote for the Court in *Casey*: "It must be stated at the outset and with clarity that *Roe's* essential holding, the holding we reaffirm [includes] . . . a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State."⁶⁷ Consequently, it also would be unreasonably burdensome for the state to prohibit the destruction of a nonviable fetus when it is an unintended consequence of a health care decision made in favor of the woman.

Furthermore, the pregnant woman's right to bodily integrity is violated by judicially compelled medical treatment. The Supreme

⁶³ Cf. *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954) (recognizing the connection between dignity, subordination, and inequality while noting that racial segregation of children in public schools "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone").

⁶⁴ Although perhaps more obviously relevant in the living will context, this belief is also relevant in the context of judicially compelled medical treatment. For example, women who refuse blood transfusions sometimes make this decision despite deadly consequences.

⁶⁵ See, e.g., Phillip E. Johnson, *The ACLU Philosophy and the Right To Abuse the Unborn*, in *EXPECTING TROUBLE: SURROGACY, FETAL ABUSE, & NEW REPRODUCTIVE TECHNOLOGIES* 135-41 (Patricia Boling ed., 1995) (critizing the American Civil Liberty Union's moral conclusion that pregnant women have a right to use drugs or engage in other conduct that harms an unborn child).

⁶⁶ See Katharine A. Taylor, *Compelling Pregnancy at Death's Door*, 7 COLUM. J. GENDER & L. 85, 112-13 (1997) (arguing that if a woman may abort a fetus before viability, she should be able to "refuse life-sustaining medical treatment mandated solely for the purpose of saving the life of the pre-viable fetus" (emphasis omitted)).

⁶⁷ *Planned Parenthood v. Casey*, 505 U.S. 833, 846 (1992).

Court's opinion in *Cruzan v. Director, Missouri Department of Health* supports the argument that court-ordered and legislatively imposed medical treatment violate the bodily integrity of pregnant women. Writing for the majority, Chief Justice Rehnquist acknowledged that the right to refuse medical treatment was a liberty interest protected by the Fourteenth Amendment. Chief Justice Rehnquist declared that "[t]he principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from [the Court's] prior decisions."⁶⁸ Moreover, the Court in *Cruzan* also stated that "the Due Process Clause protects an interest in life as well as an interest in refusing life-sustaining medical treatment."⁶⁹

In addition, the Court's holding in *Thornburgh*, prohibiting the state from weighing a pregnant woman's health or life against the health or life of her viable fetus in circumstances of abortion, can only be read as also prohibiting the state from weighing the pregnant woman's life or health against that of her fetus when the fetus is not viable.⁷⁰ Any state action of this sort would clearly violate the pregnant woman's right to privacy.

An Illinois appellate court understood the limits of the state's interest in the fetus outside of the abortion context when, in *In re Baby Boy Doe*, it refused to compel a blood transfusion and cesarean section on a pregnant woman for the sake of her viable fetus. The Illinois appellate court held that it is unconstitutional to weigh the prediction of fetal harm "against the right of the competent woman to choose the type of medical care she deem[s] appropriate"⁷¹ The court further held that "[t]he potential impact upon the fetus is not legally relevant; to the contrary, the . . . court explicitly rejected the view that the woman's rights can be subordinated to fetal rights."⁷² Consequently, courts that have held otherwise have subordinated women's rights to privacy and bodily integrity to the state's interest in the life or health of the fetus. These courts have violated fundamental constitutional rights of pregnant women.

⁶⁸ *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 278 (1990); see also *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (describing the Court's established method of substantive due process analysis); *Washington v. Harper*, 494 U.S. 210, 221-22 (1990) (describing the factual circumstances that must exist before the state may administer antipsychotic drugs to a prisoner against his will).

⁶⁹ *Cruzan*, 497 U.S. at 281. Justice O'Connor's concurrence argues that this protection stems from "our notion of liberty [which] are inextricably entwined with our idea of physical freedom and self-determination."

⁷⁰ *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 769 (1986).

⁷¹ *In re Baby Boy Doe*, 632 N.E.2d 326, 330 (Ill. App. Ct. 1994).

⁷² *Id.* at 332 (citing *Stallman v. Youngquist*, 531 N.E.2d 355 (Ill. 1998)); see also *In re A.C.*, 573 A.2d 1235, 1242, 1244 (D.C. Cir. 1990) (en banc) ("Surely . . . a fetus cannot have rights in this respect superior to those of a person who has already been born.").

The courts' decisions in both *In re A.C.* and *In re Baby Boy Doe* demonstrate their understanding that women have a liberty interest in medical decision making and they do not lose that interest upon becoming pregnant. Indeed, if women lose their interest in bodily integrity at conception, then we would allow the state to objectify women—to treat them solely as a thing to be used for the good of another or the good of the nation. As Justice Brennan asserted in his dissent in *Cruzan*, the liberty interest that permitted Nancy Cruzan to refuse life-sustaining medical treatment could not lie solely in her interest in avoiding pain, unless something greater was at stake. If it did, as Justice Brennan stated:

[I]t is not apparent why a State could not choose to remove one of her kidneys without consent on the ground that society would be better off if the recipient of that kidney were saved from renal poisoning. . . . Indeed, why could the State not perform medical experiments on her body, experiments that might save countless lives, and would cause her no greater burden than she already bears⁷³

Accordingly, at the very least, the rights to privacy and bodily integrity protect the right not to have one's body or one's self objectified or used for the good of others. When pregnant women are treated against their will for the sake of their fetuses; their "own health interests [are rendered] totally irrelevant by forcing [them] to undergo potentially painful and invasive medical treatment that is of no benefit to [them]."⁷⁴ The woman's experience is rendered legally irrelevant. At every point, the physical pain and suffering experienced by the pregnant woman as the result of the nonconsensual procedures is disregarded by the courts. She, and every other woman, is told that the pain and suffering of women is of no account to the state, especially when compared to the potential life or health of a fetus.⁷⁵ Indeed, there are few, if any, instances of greater objectification than that which occur when the person upon whom medical aid is being performed is rendered immaterial.

⁷³ *Cruzan*, 497 U.S. at 313 n.13 (Brennan, J., dissenting).

⁷⁴ Taylor, *supra* note 66, at 110.

⁷⁵ See Lisa C. Ikemoto, *Furthering the Inquiry: Race, Class, and Culture in the Forced Medical Treatment of Pregnant Women*, 59 TENN. L. REV. 487 (1992) (illustrating that when reproductive choice is considered a gender issue, without addressing issues of race and class, a complete understanding of patriarchy is prevented).

III. THE HARM TO WOMEN AS A SOCIAL CLASS: WOMEN'S CONSIGNMENT TO SECOND-CLASS CITIZENSHIP

Not only are the individual pregnant women who are compelled to have medical treatment without their consent harmed, women as a social class are also harmed by the coerced medical treatment of pregnant women. These harms take two interrelated forms. Women as a class are harmed by their resulting subordination to their reproductive capacities and state-sanctioned gender roles. Relatedly, women as a class are harmed by the way in which this subordination excludes them from full citizenship status. In this Section I expand on these arguments and further argue that by separating the value of autonomy from the rigid constructs of liberalism, we can then protect it in such a way as to guarantee to women a fuller citizenship.

A. The Subordination of Women to Their Reproductive Capacities and State-Sanctioned Mothering Roles

The compelled medical treatment of pregnant women demonstrates one way in which women's autonomy is dependent upon women conforming to state-sanctioned stereotypes regarding who women are and what their appropriate roles are in society. In other words, compelled medical treatment in this context underscores that an essential component of women's citizenship, physical and decisional autonomy, will be neither promoted or protected unless women conform to state-sanctioned mothering roles. Arguably, one of the most important of these sanctioned roles is altruism. Only when pregnant women make altruistic choices on behalf of their fetuses, are their choices assured of state protection. When pregnant women wish to make themselves, their lives, their desires, or their values primary, courts have instead restricted women's autonomy by compelling unwanted, nonconsensual treatment on behalf of the fetus.

We live in a culture where altruism is the social norm for women. Indeed altruism is often viewed as women's defining moral characteristic.⁷⁶ For example, according to psychologist Carol Gilligan, the

⁷⁶ See CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT 24-63, 159-60 (1982) (discussing how women perceive themselves in relation to others within society and how they define themselves in relation to accomplishments in relationships more than academic or career accomplishments); see also NANCY CHODOROW, THE REPRODUCTION OF MOTHERING: PSYCHOANALYSIS AND THE SOCIOLOGY OF GENDER 178 (1978) (describing "[w]omen's roles [as] basically familial, and concerned with personal, affective ties"); PATRICE DIQUINZIO, THE IMPOSSIBILITY OF MOTHERHOOD: FEMINISM, INDIVIDUALISM, AND THE PROBLEM OF MOTHERING xiii (1999) (examining the conflicted relationship of feminism and individualism); PETCHESKY, *supra* note 2, at 328 (explaining the modern definition of motherhood as a "total and selfless devotion to one's biological children").

socialization of women and girls focuses on their relationships with others, exercising care and concern for others, and nurturing others.⁷⁷ This social norm takes on added significance in discourses concerning motherhood, where women are altruistic, and motherhood is their essential purpose.⁷⁸ As mothers, women are expected to be completely self-sacrificing and selfless. They are expected to be willing to sacrifice their own lives for their children or their fetuses.⁷⁹ As Janice Raymond argues, "on a cultural level women are expected to donate themselves in the form of time, energy, and body, particularly as mothers."⁸⁰ Women who do not behave in these stereotypical ways are deemed deviant, "placing [themselves] outside female nature and culture."⁸¹ More importantly, these women risk placing themselves outside of the law's protection, for the force of law continues to be used to ensure women's compliance with female social norms.⁸²

These social norms, pertaining to women and their proper role, have been enforced throughout our nation's history by the power of law. For example, the denial of women's admission to the bar⁸³ and protective labor legislation for women⁸⁴ were predicated on gendered social roles and enforced by law. The law enforced these state-sanctioned roles even in the face of one of the primary obligations of citizenship: jury service. Women were initially excluded from jury service⁸⁵ and then excused from such service⁸⁶ on account of these social norms regarding the altruistic mother.

⁷⁷ GILLIGAN, *supra* note 76; see also Nel Noddings, *Ethics from the Standpoint of Women*, in THEORETICAL PERSPECTIVES ON SEXUAL DIFFERENCE 160 (Deborah L. Rhode ed., 1990) (defending the construction of female ethics based on women's traditional role as nurturer).

⁷⁸ See SUSAN MOLLER OKIN, WOMEN IN WESTERN POLITICAL THOUGHT 238 (1979) (citing psychologist Bruno Bettelheim, who asserted that women "want first and foremost . . . to be mothers").

⁷⁹ See PETCHESKY, *supra* note 2.

⁸⁰ JANICE G. RAYMOND, WOMEN AS WOMBS 52 (1993); see also *id.* at 47 (discussing postmortem obstetrical interventions).

⁸¹ Janice G. Raymond, *Reproductive Gifts and Gift Giving: The Altruistic Woman*, in LIFE CHOICES: A HASTINGS CENTER INTRODUCTION TO BIOETHICS 395, 399 (Joseph H. Howell & William F. Sale eds., 2d ed. 2000); see also DIQUINZIO, *supra* note 76, at xiii (arguing that femininity is defined by the attributes of maternity).

⁸² See Cherry, *Maternal-Fetal Conflicts*, *supra* note 9, at 257 (explaining that once women are described as deviant from social norms, they become subject to physician and judicial control).

⁸³ See *Bradwell v. Illinois*, 83 U.S. (1 Wall.) 130, 141 (1872) (holding that the Illinois law, which denied the admission of women to the bar, did not abridge any of the privileges and immunities of the citizens of the United States).

⁸⁴ See *Muller v. Oregon*, 208 U.S. 412, 421-23 (1908) (upholding the constitutionality of the Oregon statute, which limited the hours of employment for women).

⁸⁵ See, e.g., *State v. Hall*, 187 So. 2d 861 (Miss. 1966) (upholding Mississippi statute excluding women from jury service because of their maternal role).

⁸⁶ See, e.g., *Hoyt v. Florida*, 368 U.S. 57 (1961) (upholding Florida statute granting women an absolute exemption from jury service; finding no Fourteenth Amendment violation of the rights of potential women jurors or women defendants), *overruled by* *Taylor v. Louisiana*, 419 U.S. 522

In the context of pregnancy, women who make choices that endanger their fetuses are acting outside of the prescribed social norm. As Rosalind Petchesky states: "The woman who has an abortion makes a clear statement about her life and her understanding of her moral and social commitments relative to a potential maternal relationship; she renounces, defies the concept of motherhood as a total self-sacrifice for the sake of others."⁸⁷ Women who refuse medical treatment that would benefit their fetuses make a very similar statement. They tell us that their own values and their own lives are more important than that of their fetuses. In doing so, they risk state intervention in the medical decision making and risk losing the ability to act as autonomous moral agents.

Consequently, judicially compelled medical treatment alters women's relationship to the state. It minimizes women's standing as citizens by constraining women's ability to act autonomously in the same ways that men do.⁸⁸ Women's autonomy is constrained when they fail to conform to the social norm of the altruistic mother. Accordingly, when the state disregards women's pregnancy-related decision making, the state diminishes women's citizenship vis-a-vis men; consigning women to something less than full citizenship, which is forbidden by our current constitutional norms.⁸⁹

B. The Tradition of Women's Exclusion from Full Citizenship

Citizenship, in its most restrictive meaning, is "simply" a legal status.⁹⁰ Either one is a citizen or not.⁹¹ In a democracy, the central

(1975) (holding that statutory provisions exempting women from jury service have the effect of excluding them in violation of defendant's Sixth Amendment right to a jury of peers).

⁸⁷ PETCHESKY, *supra* note 2, at 340-41.

⁸⁸ See CYNTHIA R. DANIELS, *AT WOMEN'S EXPENSE: STATE POWER AND THE POLITICS OF FETAL RIGHTS* 2 (1993) ("Women's rights as citizens are potentially made contingent by fetal rights. They can be revoked or qualified by the state's higher interest in the fetus."); *see also* Taylor, *supra* note 66, at 163 ("[P]regnancy restrictions similarly enforce a double standard for the citizenship status of men and women. Men (rightly) retain their most fundamental interest as citizens . . . while women's same liberty is made contingent on whether their bodies may be used to medically sustain a fetus.").

⁸⁹ The Court has recognized:

[T]hat neither federal nor state government acts compatibly with the equal protection principle when a law . . . denies to women, simply because they are women, full citizenship stature—equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities.

United States v. Virginia, 518 U.S. 515, 532 (1996).

⁹⁰ ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 54 (1975) ("Citizenship is at best a simple idea for a simple government."). But as Kenneth Karst has noted, "[t]he formal status of citizenship can seem trifling only when you are able to take it for granted." Kenneth L. Karst, *Citizenship, Law, and the American Nation*, 7 *IND. J. GLOBAL LEGAL STUD.* 595, 596 (2000). For African-Americans living under Jim Crow, or for resident aliens today, legal status was of immense importance. *Id.* at 596.

values of citizenship are rights and obligations. With regard to rights, Professor Kenneth Karst notes: "Once we recognize that citizenship is more than the 'simple idea' of legal status, the value of participation can be seen to embrace a fuller range of sharing the public life of the society."⁹² Thus expanded, citizenship also includes both "[t]he equality of political rights" and "[t]he dignity of work and of personal achievement,"⁹³ or in other words, citizenship includes political, social, and economic rights and opportunities—the ability to control one's own life. The rights of privacy and bodily integrity protect this value of citizenship. By disregarding women's pregnancy-related decision making, the state diminishes women's citizenship by restricting women's autonomy and equality. In so doing, the state subordinates women to their reproductive role and the state-sanctioned definition of appropriate womanhood, thus prohibiting women from speaking in their own voices.

However, the liberal concept of citizenship has been highly criticized, and properly so, because it has excluded women from its definition of full citizenship.⁹⁴ As philosopher Susan James asserts, the liberal conception of citizenship accomplishes this

by denying women the full complement of rights and privileges accorded to men, and more insidiously, by taking for granted a conception of citizenship which excludes all that is traditionally female. The cluster of activities, values, ways of thinking and ways of doing things which have long been associated with women are all conceived as outside the political world of citizenship and largely irrelevant to it.⁹⁵

Despite the "egalitarian aspirations" of liberalism and of American democracy, American women, along with other women in the world, continue to be deprived of full citizenship as "democratic liberal theory still nurtures a conception of politics which implicitly marginalizes and disadvantages women."⁹⁶ Much of this disadvantage comes

⁹¹ See Kunal M. Parker, *State, Citizenship, and Territory: The Legal Construction of Immigrants in Antebellum Massachusetts*, 19 L. & HIST. REV. 583, 583 (2001) ("Modern citizenship—understood in terms of the formal legal distinction between 'citizen' and 'alien' . . . determines whether a given individual does or does not enjoy unimpeded rights . . .").

⁹² Kenneth L. Karst, *The Supreme Court, 1976 Term – Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 8–9 (1977).

⁹³ JUDITH N. SHKLAR, *AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION* 1 (1991).

⁹⁴ See, e.g., IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* 110–11 (1990) (noting that marginalized groups, specifically women, gays and lesbians, and people of color have been excluded from citizenship); see also *id.* at 54–55 (arguing that marginalized groups should not be deprived of choice and respect in democratic society).

⁹⁵ Susan James, *The Good-Enough Citizen: Female Citizenship and Independence*, in *BEYOND EQUALITY AND DIFFERENCE: CITIZENSHIP, FEMINIST POLITICS, AND FEMALE SUBJECTIVITY* 48 (Gisela Bock & Susan James eds., 1992).

⁹⁶ *Id.*; see also MACKINNON, *supra* note 3, at 157–70 (1989) (discussing the role of feminism in the liberal state); Frances Olsen, *Constitutional Law: Feminist Critiques of the Public/Private Distinc-*

from the deeply held belief that noninterference by the state protects and enhances the ability of citizens to act in an autonomous manner.

As a result, radical feminists believe that liberalism, because of its misogynist and patriarchal foundations, is beyond repair and hence has nothing to offer women but second-class citizenship.⁹⁷ As Pateman argues:

The patriarchal understanding of citizenship means that the two demands [(employment and motherhood)] are incompatible because it allows two alternatives only: either women become (like) men, and so full citizens; or they continue at women's work [(motherhood)], which is of no value for citizenship. . . . To demand that citizenship, as it now exists, should be fully extended to women accepts the patriarchal meeting of [the term, and] . . . at best, citizenship can be extended to women only as lesser men. At the same time, within the patriarchal welfare state, to demand proper social recognition and support for women's responsibilities is to condemn women to less than full citizenship⁹⁸

Nevertheless, some feminists have suggested that liberalism may yet have some potential for liberation of women if the society endorses a more just, and perhaps radical, conception of citizenship that takes into account the material conditions needed for women to fully participate in the political, social, and economic life of the nation.⁹⁹ Of course, in order for this to occur, we must destroy the distinctions between the public and private that have operated to fuel women's invisibility, while keeping the opportunities for individual decision making, and the opportunities for women to speak in their own voice.¹⁰⁰ A fundamental task in the pursuit of equal citizenship is an understanding of the role of autonomy in citizenship and the ways that society limits women's autonomy, thus denying them full citizenship.

tion, 10 CONST. COMMENT. 319, 327 (1993) (explaining that public/private distinctions, which are part and parcel of liberal theory, draw boundaries that perpetuate women's subordination).

⁹⁷ See, e.g., IRIS MARION YOUNG, *INTERSECTING VOICES: DILEMMAS OF GENDER, POLITICAL PHILOSOPHY, AND POLICY* 3 (1997) ("[T]he basic social conditions to which feminists called attention twenty years ago for the most part have not improved, and in some areas . . . have deteriorated."); ALISON M. JAGGAR, *FEMINIST POLITICS AND HUMAN NATURE* 102 (1983) ("Whether or not they believe that women's subordination is primary in the historical sense, radical feminists generally agree that it is primary in the causal sense of constituting the root of many other social problems."); MACKINNON, *supra* note 3, at 170 ("Male power is systemic. Coercive, legitimated, and epistemic, it is the regime.").

⁹⁸ CAROLE PATEMAN, *THE DISORDER OF WOMEN: DEMOCRACY, FEMINISM AND POLITICAL THEORY* 197 (1989).

⁹⁹ See, e.g., Anita L. Allen, *The Proposed Equal Protection Fix for Abortion Law: Reflections on Citizenship, Gender, and the Constitution*, 18 HARV. J.L. & PUB. POL'Y 419, 451-52 (1995) (illustrating how liberal political theories can be used to support not only a woman's choice to have an abortion but also access to an abortion); cf. Linda C. McClain, *Reconstructive Tasks for a Liberal Feminist Conception of Privacy*, 40 WM. & MARY L. REV. 759, 765 (1999) (arguing that privacy is not simply a negative liberty but one that government must secure).

¹⁰⁰ See PATEMAN, *supra* note 98, at 52-53.

C. *Autonomy's Liberatory Potential*

Autonomy, understood as decisional privacy, is essential for citizenship in the liberal state because it allows citizens to engage in the political and economic life of the nation.¹⁰¹ As such, it is at the heart of our privacy jurisprudence. At the same time however, privacy jurisprudence often has failed to protect women's ability to act in autonomous ways. Hence, autonomy is simultaneously necessary and problematic. Professor Catharine MacKinnon has eloquently described privacy and the problem that privacy jurisprudence creates for women. She writes:

Regarded as the outer edge of the limitations on government, the idea of privacy embodies a tension between precluding public exposure or governmental intrusion on the one hand, and autonomy in the sense of protecting personal self-action on the other. This is a tension, not just two facets of one right. The liberal state resolves this tension by identifying the threshold of the state at its permissible extent of penetration into a domain that is considered free by definition: the private sphere. By this move the state secures "an inviolable personality" by ensuring "autonomy of control over the intimacies of personal identity. The state does this by centering its self-restraint on body and home, especially bedroom. By staying out of marriage and the family—essentially meaning . . . heterosexuality—from contraception through pornography to the abortion decision, the law of privacy proposes to guarantee individual bodily integrity, personal exercise of moral intelligence, and freedom of intimacy. . . . The law of privacy . . . translates traditional liberal values

¹⁰¹ See McClain, *supra* note 99, at 766 (noting that Professor Anita Allen's view of "private choice" is consistent with the argument that liberalism is premised on ethical individualism and moral independence and thus the government "must not dictate what its citizens think about matters of political . . . judgment" (quoting RONALD DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 26 (1996))); see also YOUNG, *supra* note 94, at 123–24 (discussing how traditionally autonomy has been defined as "a sense of self-confidence, and inner direction, as well as the ability to be reflective, not swayed by immediate impulse or blind emotion in the making of political argument"). Tracy Higgins argues that the importance of autonomy depends upon one's orientation. She asserts:

This assumption of agency—of citizens' freedom and ability to define their own ends—is therefore essential to all mainstream constitutional theory. For rights foundationalists, the self-determining individual stands at the core of liberal commitments to neutrality. The constitutional framework preserves his autonomy against the will of the majority, and his freedom to act on his own vision of the good defines liberal constitutionalism's central value. For democrats, the capacity of individuals to reflect on their own interests and on the public good, and then to act in concert to govern themselves, provides the foundation for legitimate state action. The political participation of free and equal citizens signifies continuing consent to the power of majorities—consent upon which state power depends.

Tracy E. Higgins, *Democracy and Feminism*, 110 HARV. L. REV. 1657, 1664–65 (1997) (footnotes omitted).

into the rhetoric of individual rights as a means of subordinating those rights to specific social imperatives.¹⁰²

Hence, as MacKinnon notes, it is presumed that privacy and therefore autonomy, currently constructed as protection from the state, protects women's autonomy or women's freedom to choose; but in reality, privacy, as currently constructed, works to preserve the status quo of women's inequality and subordination. However, there is at least one other possibility. Privacy does not have to safeguard women's inequality. Instead, privacy can be understood as a positive state obligation to ensure women's equal citizenship. Privacy can be understood as an affirmative obligation on the part of the state to protect the underlying conditions that make full citizenship possible.¹⁰³ Susan James notes:

Within the liberal tradition, certain kinds of dependence have long been recognized as hindrances to political participation. First, in order to speak in their own voices, citizens must be physically independent, free from bodily violation or the threat of it. Second, citizens are not in a position to express their political views if by doing so they run the risk of losing the means to provide for themselves and their dependants, the risk of either destitution or slavery. These freedoms are traditionally secured by individual rights to life, liberty and property, rights which are in turn interpreted in the light of the demand that the citizen should have the security or independence to contribute to the polity in his or her own voice.¹⁰⁴

Certainly, the Fourteenth Amendment has been interpreted to require that equality be fostered and protected in order to secure these same requirements of citizenship.¹⁰⁵ As James notes, "independent citizens are not found but made, forged out of a collection of elaborate social arrangements designed to provide certain kinds of secu-

¹⁰² MACKINNON, *supra* note 3, at 187 (quoting Tom Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L. L. REV. 233, 236 (1977)).

¹⁰³ Professor Jed Rubenfeld suggests that privacy should also encompass prohibiting the state from imposing a state-supported identity on its citizens by enforcing social norms. Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 784 (1989) (stating that the right of privacy is the "freedom not to have one's life too totally determined by . . . [the] state"); see also *id.* at 794 (discussing how the right of privacy should "prevent[] the state from imposing on individuals a defined identity").

¹⁰⁴ James, *supra* note 95, at 50.

¹⁰⁵ See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (finding that separate educational facilities that "deprive children of the minority group of equal educational opportunities" are unconstitutional because of the importance of education in state and local governments).

city," such as the secret ballot, which allowed men to participate in governance without fear of physical or economic retaliation.¹⁰⁶

As previously noted, however, autonomy as traditionally conceived has been used to exclude women from equal citizenship. Women's social and economic dependence on men and the lack of social arrangements designed to protect the security of women's voices have made autonomy for women illusory in at least two different ways. First, with regard to dependency, women have been socially and economically dependent in our culture. As such, they have been controlled by their social roles as mothers and nurturers of children and men. Thus, they are not understood as appropriately autonomous, and are not regarded as proper citizens. Many feminists have recognized these limitations of the traditional understanding of autonomy.¹⁰⁷ As Young notes: "Attentive love disqualifies the nurturers of the individuality and autonomy of citizens and from the exercise of citizenship . . . because the character of mothers tends to be emotional and oriented to particular needs and interests instead of to the general good."¹⁰⁸

The second force that has constrained women's autonomy is the absence of social and legal mechanisms that ensure women's ability to speak in their own voices. For example, women have not been treated as individuals, but rather as parts of families, where their roles as reproducers and nurturers have been their only value. Because families have not been thought of as a proper inquiry for law, economics, or other public institutions, women have suffered violence that restricts their participation in politics and economics. Familial violence, for which women have had little if any legal recourse, constricts women's abilities to contribute, using their own voices, without the threat of physical harm. Hence, wife beating and the lack of an appropriate legal response to ensure women's safety is one example of how social and legal mechanisms that ensure women's autonomy have not been well developed in liberal politics. We are just beginning to develop such mechanisms. Professor MacKinnon eloquently describes this slow change in women's status from an appropriate receptor of private/familial violence to equal citizen, and the difficulties faced. MacKinnon argues:

One way to describe the process of change in women's legal status from chattel to citizen is as a process of leaving home. The closer to

¹⁰⁶ James, *supra* note 95, at 51.

¹⁰⁷ See YOUNG, *supra* note 94, at 124; Jennifer Nedelsky, *Reconceiving Autonomy: Sources, Thoughts and Possibilities*, 1 YALE J.L. & FEMINISM 7, 9 (1989) (referencing the feminist argument that "women are not seen and defined as themselves, but in their relations to others . . . as someone's wife or mother").

¹⁰⁸ YOUNG, *supra* note 94, at 124.

home women's injuries are addressed, the less power and fewer rights they seem to have; the further away from home the forum, the more power and rights women have gained—and with them freedom of action, resources, and access to a larger world. In experiential terms, women are least equal at home, in private; they have had the most equality in public, far from home. It is in the private, man's sovereign castle, where most women remain for a lifetime, where women are most likely to be battered and sexually assaulted, and where they have no recourse because the private, by definition, is inviolable and recourse means intervention. . . . As a result of such balances that men with power strike among themselves, represented in the shape of public institutions, men have the most freedom at home, and women gain correspondingly greater equality, hence freedom, the further away from home they go.¹⁰⁹

Nevertheless, if autonomy is the ability to “make choices about one's life and to act on those choices without having to obey others, meet their conditions, or fear their threats and punishments,”¹¹⁰ and the ability to live by one's own law,¹¹¹ then it can be made available to women. Women can be liberated from male violence in private and in public if autonomy can be liberated from its traditional liberal meaning of governmental noninterference. In order for autonomy to have real significance in women's lives, the state must have dual obligations: to be noncoercive (instead of noninterference) and to assert an affirmative obligation to secure conditions that promote autonomous, noncoercive decision making.¹¹² Within the liberal state, such reconstruction is not merely reformist, it is revolutionary. It demonstrates the potential for the liberation of autonomy from

¹⁰⁹ Catharine A. MacKinnon, *Disputing Male Sovereignty: On United States v. Morrison*, 114 HARV. L. REV. 135, 174–75 (2000); see also MARTHA C. NUSSBAUM, SEX AND SOCIAL JUSTICE 63–64 (1999) (criticizing the tendency of liberal thinkers to “segment the private from the public sphere, considering the public sphere to be the sphere of individual rights and contractual arrangements, the family to be a private sphere . . . into which the state should not meddle”). Justice O'Connor's plurality opinion in *Casey* in some ways took note of these issues. O'Connor seemed to understand the women could not act autonomously in the face of familial violence. *Planned Parenthood v. Casey*, 505 U.S. 833, 893–94 (1991) (finding the spousal notification provision at issue unconstitutional as an undue burden on the pregnant woman's right to abortion, in part on account of the prevalence of domestic violence).

¹¹⁰ YOUNG, *supra* note 94, at 125–26.

¹¹¹ See Nedelsky, *supra* note 107, at 34 (arguing that the role of the state in a democracy is to ensure that the state does not act in ways that undermine its citizens' autonomy described as their “capacity to find and live by their own law”).

¹¹² Of course this is why decisional autonomy (spoken about in the language of “privacy”) has been so problematic for feminists. As Elizabeth Schneider notes, the articulation of women's right to procreate in the language of privacy “reinforces and legitimizes the public and private dichotomy which historically has been damaging to women. For women, the domestic sphere and sexuality—primary areas of subordination—have been viewed as private and unregulated.” Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589, 638 (1986); see also MACKINNON, *supra* note 3, at 193–94 (“[A] right to that privacy isolates women at once from each other and from public recourse.”).

traditional patriarchal norms. Within this restructured meaning, autonomy can, and should, take into account the social construction of individuals, and the social constraints on their choices. Indeed, the feminist reconstruction of autonomy takes into account that "social conditions not only limit the ability of individuals to act upon their own vision of the good but also define the very content of that vision."¹¹³ By liberating autonomy from its traditional liberal confines, we see that it can be understood in ways that are potentially freeing for women.

In order to complete autonomy's liberation from traditional patriarchal norms, and to advance women's citizenship, women's decisional privacy has to be secured by the force of law. It is not enough that it is simply protected by governmental noninterference, fed by liberal assumptions that the only obligations of the state toward women are negative in nature.¹¹⁴ Nor can this be accomplished, as liberals often suggest with respect to women, by ignoring difference or by suggesting that difference is irrelevant to political equality (and hence citizenship). Liberals quite clearly comprehend that, at least with respect to race, difference is not irrelevant to political equality, and that some may need to be treated differently than others to secure a minimal level of autonomy in order to allow them to participate in the political and economic life of the nation. For example, liberals support affirmative action mechanisms that treat people of color differently in order to secure for people of color a minimal level of political and economic security, which permits them to participate as citizens.¹¹⁵ Some citizens, like people of color, are selected for special treatment in some contexts because the effects of their differences (or the effects of inequality) can only be eased by treating them differently. As James notes: "There is thus a sense in which liberal theory takes account of difference, not as something that is po-

¹¹³ Higgins, *supra* note 101, at 1665.

¹¹⁴ See, e.g., *Harris v. McRae*, 448 U.S. 297, 326 (1980) (upholding the constitutionality of the Hyde Amendment, which prohibited the use of federal funds to pay for medically necessary abortions for poor women).

¹¹⁵ Susan James gives the example of this argument with respect to women as mothers. She explains:

[M]others should be awarded a family allowance to compensate them for the loss of their economic independence while they bear and bring up children. To put the point another way, exponents of this liberal view recognize that the difference between mothers and others jeopardizes the economic independence of mothers, and holds that the state should intervene to guarantee that their independence is preserved.

James, *supra* note 95, at 52; see also Carole Pateman, *Equality, Difference, Subordination: The Politics of Motherhood and Women's Citizenship*, in *BEYOND EQUALITY AND DIFFERENCE* 17, 17-31 (Gisela Bock & Susan James eds., 1992) (discussing the challenges feminists face when attempting to reconcile notions of women as equal with notions of women as different).

litically valuable in itself, but as something that is politically relevant because it threatens the equal independence of citizens."¹¹⁶

Justice Blackmun has long understood the connection between forced pregnancy and equal citizenship for women. Indeed, in his concurrence in *Casey*, he makes the first mention of this connection in Supreme Court jurisprudence. He argues that restrictions on abortion, not just the lack of legal abortion, amount to forced pregnancy, and as a result many of the restrictions at issue in *Casey* violate the constitutional requirement of gender equality. He states:

A State's restrictions on a woman's right to terminate her pregnancy also implicate constitutional guarantees of gender equality. State restrictions on abortion compel women to continue pregnancies they otherwise might terminate. By restricting the right to terminate pregnancies, the State conscripts women's bodies into its service, forcing women to continue their pregnancies, suffer the pains of childbirth, and in most instances, provide years of maternal care. The State does not compensate women for their services; instead, it assumes that they owe this duty as a matter of course. This assumption—that women can simply be forced to accept the "natural" status and incidents of motherhood—appears to rest upon a conception of women's role that has triggered the protection of the Equal Protection Clause. The joint opinion recognizes that these assumptions about women's place in society "are no longer consistent with our understanding of the family, the individual, or the Constitution."¹¹⁷

Justice Ruth Bader Ginsberg has also noted that women's equality and equal citizenship demands that women's decisional privacy be respected in pregnancy-related decision making. In describing the Court's holding in *Roe*, Justice Ginsberg commented:

The conflict, however, is not simply one between a fetus' interests and a woman's interests, narrowly conceived, nor is the overriding issue state versus private control of a woman's body for a span of nine months. Also in the balance is a woman's autonomous charge of her full life's course . . . her ability to stand in relation to man, society, and the state as an independent, self-sustaining, equal citizen.¹¹⁸

CONCLUSION: SECURING WOMEN'S AUTONOMY IN THE CONTEXT OF PREGNANCY-RELATED DECISION MAKING: FORCED MEDICAL TREATMENT AND IMPLICATIONS FOR AUTONOMY

The constitutional rights to privacy and bodily integrity should protect women's access to abortion and pregnancy-related decision making. As articulated by the Court, these rights are individual rights

¹¹⁶ James, *supra* note 95, at 52.

¹¹⁷ *Planned Parenthood v. Casey*, 505 U.S. 853, 928–29 (1992) (Blackmun, J., concurring in part and dissenting in part) (citations omitted).

¹¹⁸ Ruth Bader Ginsberg, *supra* note 7, at 383 (footnote omitted).

that in most circumstances simply protect a woman's right to choose abortion or to choose to continue her pregnancy. But viewed through the lens of compelled medical treatment of pregnant women, the right to privacy can be understood as something more substantial. If what is being protected by privacy is the right to decisional autonomy, then perhaps privacy is not simply a negative right—the right to be left alone to make up your mind in private. If understood as decisional autonomy, then the notion of privacy expands to include an affirmative state obligation to ensure that women, regardless of whether they are pregnant, get to make decisions regarding health care autonomously, not without context, but without familial or state coercion.¹¹⁹ If autonomy is a necessary predicate for citizenship, and women have a right to full citizenship, then the state has an expanded obligation. The state then has the obligation to insure conditions under which women are able to act independently and autonomously, and to speak in their own voices without fear of physical or economic reprisals. Women should not have to “leave home,” in MacKinnon's words, in order for the state to understand its obligation.¹²⁰ By protecting women's decisional autonomy (here in the context of health care decision making) with the force of law, the state can help to secure women's access to a fuller citizenship.

¹¹⁹ Even the Supreme Court seems to understand the ways in which the “private family” can coerce women into making particular choices. For example, in *Casey*, the Court in a joint opinion written by Justice O'Connor, clearly understands some of the ways in which domestic violence can eviscerate women's autonomy. *Casey*, 505 U.S. at 893–94 (stating that the prevalence of domestic violence in women's lives is one reason that the spousal notification provision of the statute is deemed unduly burdensome and hence unconstitutional). What the Court completely ignores is the way in which state coercion works to destroy women's decision-making authority. One example of this is the plethora of state restrictions on abortion that are permissible. Not only does the state have no affirmative obligations to pay for the abortions of poor women, but after the Court's pronouncement in *Casey*, states may restrict abortion by prescribing waiting periods, “informed consent” stipulations meant to change women's minds about abortion, and by requiring parental consent for minors. All of these restrictions make abortion harder to access, particularly for poor women, and these restrictions exist where the state pays for and supports sterilizations for the same women who are thwarted by lack of funding, not only for abortion, but also for family planning. These regulations are constructed in such a way as to punish poor women for engaging in sexual activity. Having no meaningful options punishes them. Because of the regulations, poor women are left with two “choices”: either abstain from sexual intercourse, the mainstay of sexual activity for heterosexual women, or “choose” surgical sterilization. Consequently, for many of these women, the only “decision” that can be made in order to avoid unplanned pregnancies is sterilization, a decision that is not made autonomously but rather coerced by the state.

¹²⁰ MacKinnon, *supra* note 109, at 174–75.